



BILLING CODE

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 556 and 558

RIN 3141-AA15

Tribal Background Investigations and Licensing

AGENCY: National Indian Gaming Commission

ACTION: Notice of proposed rulemaking.

SUMMARY: The proposed rule modifies certain NIGC regulations concerning background investigations and licenses to reduce the quantity of documents that must be submitted to the Commission; to require that two notifications be submitted to the Commission in order to comply with the Indian Gaming Regulatory Act (IGRA); and to establish the requirements for the issuance of temporary and permanent gaming licenses.

DATES: Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

- *Email comments to:* reg.review@nigc.gov.
- *Mail comments to:* National Indian Gaming Commission, 1441 L Street NW, Suite 9100, Washington, D.C. 20005.

- *Hand deliver comments to:* 1441 L Street NW, Suite 9100, Washington, D.C. 20005.
- *Fax comments to:* National Indian Gaming Commission at 202-632-0045.

FOR FURTHER INFORMATION CONTACT: National Indian Gaming Commission, 1441 L Street NW, Suite 9100 Washington, D.C. 20005. Telephone: 202-632-7009; email: reg.review@nigc.gov

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

II. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701 et seq., was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (“Commission”) and sets out a comprehensive framework for the regulation of gaming on Indian lands. The purposes of IGRA include providing a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal

governments; ensuring that the Indian tribe is the primary beneficiary of the gaming operation; and declaring that the establishment of independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. § 2702.

On November 18, 2010, the National Indian Gaming Commission (NIGC) issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process NIGC should utilize to make revisions. 75 FR 70680 (Nov. 18, 2010). On April 4, 2011, after holding eight consultations and reviewing all comments, NIGC published a Notice of Regulatory Review Schedule (NRR) setting out a consultation schedule and process for review. 76 FR 18457. The Commission's regulatory review process established a tribal consultation schedule with a description of the regulation groups to be covered at each consultation. These Parts 556 and 558 were included in this regulatory review.

III. Development of the Proposed Rule

The Commission conducted a total of 9 tribal consultations as part of its review of Parts 556 and 558. Tribal consultations were held in every region of the country and were attended by over 137 tribes and 381 tribal leaders or their representatives. In addition to tribal consultations, on July 7, 2011, the Commission requested public comment on a Preliminary Draft of amendments to Parts 556 and 558. After

considering the comments received from the public and through tribal consultations, the Commission proposes to amend these parts and formalize the “pilot program” background investigation and licensing procedures.

Parts 556 and 558 address background investigations and licenses for gaming operation key employees and primary management officials. These regulations require tribes to submit to the NIGC an application and investigative report on all key employees and primary management officials employed by tribal gaming operations. In the 1990s, the NIGC initiated a “pilot program” for tribes who had a proven track record of complying with the background and licensing regulations. The purpose of this program was to reduce the quantity of documents the tribes were required to submit to the NIGC. Tribes participated in the pilot program by signing a memorandum of understanding with the NIGC that allowed a tribe to submit a notice of results (NOR) instead of the application and investigative report. The notice of results provided a synopsis of the background investigation and results to the NIGC on key employees and primary management officials. These regulatory changes would negate the need for memorandum of understandings with tribes and eliminate requirement that tribes submit an application and investigation report for each key employee and primary management official. Instead, tribes would be required to submit a notice of results for the background investigation of key employees and primary management officials as well as to retain applications and investigation reports for the NIGC to review.

The IGRA requires that tribes submit background investigation results to the Commission before issuing licenses. 25 U.S.C. 2710(b)(2)(F)(ii)(III). The tribe must

then notify the NIGC after it has issued the license to primary management officials or key employees. 25 U.S.C. 2710(b)(2)(F)(ii)(I).

A. General Comments

Commenters supported the changes put forward in the preliminary draft. Tribes noted that the pilot program has been a success and that they were supportive of the NIGC's proposal to formalize the pilot program into regulations. One commenter noted that the current procedure is burdensome and that formalization of the pilot program creates efficiency in the background and licensing process. Some commenters questioned the level of detail included in the regulations, but also noted that these changes were an improvement over the current regulations while not substantively increasing the requirements.

B. Background Investigation and Licensing

Tribes are currently required to submit a completed application of background information upon the employment of a key employee or primary management official. 25 C.F.R. 556.5(a). Tribes are also required to submit a background investigative report before issuing a license to a key employee or primary management official. 25 C.F.R. 556.5(b). The investigative report is required to include: (1) steps taken in conducting a background investigation; (2) results obtained; (3) conclusions reached; and (4) the bases for those conclusions. 25 C.F.R. 556.5(b). When submitting the investigative report, tribes are also required to include a copy of the eligibility determination. Some commenters recommended using "suitability determination" in the place of "eligibility determination." The Commission considered this recommendation but after reviewing the language of the

Act, decided against making that change. The Act references suitability for determining whether a person is eligible for employment. 25 U.S.C. 2710(b)(2)(f)(ii)(II).

A tribe is required to develop licensing procedures for all employees of the gaming operation and to retain applications for employment and reports of any background investigations for inspection by the Commission for no less than three years from the dates of termination of employment of key employees and primary management officials. The licensing requirements are included in a tribal ordinance when submitted to the Chair for approval.

The proposed rule continues to require a tribe to create and maintain: (1) a gaming license application identical to the one required under the current regulations; (2) an investigative report identical to the one required to be submitted to the NIGC under the current regulations; and (3) a copy of the eligibility determination. The proposed rule, however, reduces the submission requirements. In cases where a tribe issues a license, the tribe need only submit a notice of results (NOR)—rather than the application and investigative report—to the NIGC no later than 60 days after the applicant begins work. Tribes are also required to submit a notice of the issuance of a license to the NIGC. In cases where a tribe does not issue a license, it must forward the investigative report to NIGC for inclusion in the Indian Gaming Individual Records System.

Many commenters noted that a uniform method of sending the NOR to the NIGC would be useful. The Commission agrees and has developed the form included in this Notice to be used by all tribes submitting NOR's to the NIGC.

Under the proposed rule, a tribe would be required to maintain a completed licensing application for a primary management official or key employee. The tribe must conduct a background investigation to determine the eligibility of the employee for a gaming license. The proposed rule refines the purpose of the background investigation as one needed to determine whether the employee is eligible for a gaming license. Tribes can determine for themselves what services to utilize to conduct the investigation. In some instances, the state may provide this service, or in others, the tribe may utilize federal or private services. One commenter suggested requiring applicants to provide a list of all associations to which they pay membership dues. While this change was not made in the proposed rule, the Commission is interested in hearing whether this is a requirement that should be included in the regulation.

In addition, the proposed rule changes current regulations by clarifying that these parts do not apply to licenses that are intended to expire within 90 days of issuance. Many tribes utilize a temporary license system. The NIGC does not propose to restrict the tribes' authority to send applicants to work while processing their background investigations, so long as they are not employed for more than 90 days without obtaining a license that meets the requirements of these parts.

C. Access to background investigation

Many commenters requested improved access to the background investigation materials obtained by the NIGC. While the NIGC does collect the NOR submitted by tribes on primary management officials and key employees that information is not currently made available to third-party tribes. In response to the many comments on

improved access the NIGC is working towards making information more readily available to tribes. Until there is sufficient resources and technology to make this kind of information available in a secure format, the NIGC will endeavor to make information available when and where appropriate.

Two commenters requested that the NIGC remove the requirements of § 556.2 and § 556.3 which reference ordinance amendments with regard to the Privacy Act and False Statement notices. The NIGC agrees that ordinance amendments need not be mentioned in that section because tribes may include specifics of background investigation procedures—including Privacy Act and False Statement notices—in supplementary submission materials rather than placing them in the ordinance itself (See 25 C.F.R. § 522.2 (b)). Once final, however, all future ordinances and submission materials, must comply with § 556.8 of this proposed rule. The NIGC further notes that the privacy notice is required by federal law to notify applicants of the restrictions binding the NIGC as a federal agency for releasing personal information. Tribes are not necessarily bound by those restrictions, but must supply the notice to applicants before submitting their information to NIGC as required by 25 U.S.C. § 2710(b)(2)(F)(ii)(III).

One commenter suggested that tribes should have the discretion to decide whether to keep confidential the identities of those interviewed in the course of a background investigation. NIGC disagrees, notes that this is an existing requirement under the current regulations and pilot program (*See* 25 C.F.R. § 556.4(b)), and believes the promise of confidentiality is necessary for obtaining sensitive information from those interviewed.

Regulatory Matters

Regulatory Flexibility Act

The proposed rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions, nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 3141– 0007, which expired in August of 2011. The NIGC is in the process of reinstating that Control Number.

List of Subjects in 25 CFR Part 556

Gaming, Indian lands

25 CFR Part 558

Gaming, Indian lands

Text of the Proposed Rules

For the reasons discussed in the Preamble, the Commission proposes to amend Subchapter E of Title 25 to read as follows:

1. Revise Part 556 to read as follows:

**PART 556 – BACKGROUND INVESTIGATIONS FOR PRIMARY
MANAGEMENT OFFICIALS AND KEY EMPLOYEES**

Sec.

556.1 Scope of this part.

556.2 Privacy notice.

556.3 Notice regarding false statements.

556.4 Background investigations.

556.5 Tribal eligibility determination.

556.6 Report to the Commission.

556.7 Notice.

556.8 Compliance with this part.

Authority: 25 U.S.C. 2706, 2710, 2712.

§ 556.1 Scope of this part.

Unless a tribal-state compact assigns sole jurisdiction to an entity other than a tribe with respect to background investigations, the requirements of this part apply to all class II and class III gaming. The procedures and standards of this part apply only to primary management officials and key employees. This part does not apply to any license that is intended to expire within 90 days of issuance.

§ 556.2 Privacy notice.

(a) A tribe shall place the following notice on the application form for a key employee or a primary management official before that form is filled out by an applicant:

In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information on this form is authorized by [25 U.S.C. 2701](#) et seq. The purpose of the requested information is to determine the eligibility of individuals to be granted a gaming license. The information will be used by the Tribal gaming regulatory authorities and by the National Indian Gaming Commission (NIGC) members and staff who have need for the information in the performance of their official duties. The information may be disclosed by the Tribe or the NIGC to appropriate Federal, Tribal, State, local, or foreign law enforcement and regulatory agencies when relevant to civil, criminal or regulatory investigations or prosecutions or when pursuant to a requirement by a tribe or the NIGC in connection with the issuance, denial, or revocation of a gaming license, or investigations of activities while associated with a tribe or a gaming operation. Failure to consent to the disclosures indicated in this notice will result in a tribe's being unable to license you for a primary management official or key employee position.

The disclosure of your Social Security Number (SSN) is voluntary. However, failure to supply a SSN may result in errors in processing your application.

(b) A tribe shall notify in writing existing key employees and primary management officials that they shall either:

- (1) Complete a new application form that contains a Privacy Act notice; or
- (2) Sign a statement that contains the Privacy Act notice and consent to the routine uses described in that notice.

(c) All license application forms used one-hundred eighty (180) days after the effective date of this section shall comply with this section.

§ 556.3 Notice regarding false statements.

(a) A tribe shall place the following notice on the application form for a key employee or a primary management official before that form is filled out by an applicant:

A false statement on any part of your license application may be grounds for denying a license or the suspension or revocation of a license. Also, you may be punished by fine or imprisonment ([U.S. Code, title 18, section 1001](#)).

(b) A tribe shall notify in writing existing key employees and primary management officials that they shall either:

(1) Complete a new application form that contains a notice regarding false statements; or

(2) Sign a statement that contains the notice regarding false statements.

(c) All license application forms used 180 days after the effective date of this section shall comply with this section.

§ 556.4 Background investigations.

A tribe shall perform a background investigation for each primary management official and for each key employee of a gaming operation.

(a) A tribe shall request from each primary management official and from each key employee all of the following information:

(1) Full name, other names used (oral or written), social security number(s), birth date, place of birth, citizenship, gender, all languages (spoken or written);

(2) Currently and for the previous five years: business and employment positions held, ownership interests in those businesses, business and residence addresses, and driver's license numbers;

(3) The names and current addresses of at least three personal references, including one personal reference who was acquainted with the applicant during each period of residence listed under paragraph (a)(2) of this section;

(4) Current business and residence telephone numbers;

(5) A description of any existing and previous business relationships with Indian tribes, including ownership interests in those businesses;

(6) A description of any existing and previous business relationships with the gaming industry generally, including ownership interests in those businesses;

(7) The name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit related to gaming, whether or not such license or permit was granted;

(8) For each felony for which there is an ongoing prosecution or a conviction, the charge, the name and address of the court involved, and the date and disposition if any;

(9) For each misdemeanor conviction or ongoing misdemeanor prosecution (excluding minor traffic violations) within 10 years of the date of the application, the name and address of the court involved and the date and disposition;

(10) For each criminal charge (excluding minor traffic charges) whether or not there is a conviction, if such criminal charge is within 10 years of the date of the application and is not otherwise listed pursuant to paragraph (a)(8) or (a)(9) of this section, the criminal charge, the name and address of the court involved and the date and disposition;

(11) The name and address of any licensing or regulatory agency with which the person has filed an application for an occupational license or permit, whether or not such license or permit was granted;

(12) A photograph;

(13) Any other information a tribe deems relevant; and

(14) Fingerprints consistent with procedures adopted by a tribe according to §522.2(h) of this chapter.

(b) If, in the course of a background investigation, a tribe discovers that the applicant has a notice of results on file with the NIGC from a prior investigation and the tribe has access to the earlier investigative materials (either through the NIGC or the previous tribal investigative body), the tribe may rely on those materials and update the investigation and investigative report under 556.6(b)(1) of this part.

(c) In conducting a background investigation, a tribe or its agents shall keep confidential the identity of each person interviewed in the course of the investigation.

§ 556.5 Tribal Eligibility Determination.

A tribe shall conduct an investigation sufficient to make an eligibility determination.

(a) To make a finding concerning the eligibility of a key employee or primary management official for granting of a gaming license, an authorized tribal official shall review a person's:

- (1) Prior activities;
- (2) Criminal record, if any; and
- (3) Reputation, habits and associations.

(b) If the authorized tribal official, in applying the standards adopted in a tribal ordinance, determines that licensing of the person poses a threat to the public interest or to the effective regulation of gaming, or creates or enhances the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming, an authorizing tribal official shall not license that person in a key employee or primary management official position.

§ 556.6 Report to the Commission.

(a) When a tribe employs a primary management official or a key employee, the tribe shall maintain a complete application file containing the information listed under §556.4(a)(1)–(14) of this part.

(b) Before issuing a license to a primary management official or to a key employee, a tribe shall:

(1) Create and maintain an investigative report on each background investigation.

An investigative report shall include all of the following:

(i) Steps taken in conducting a background investigation;

(ii) Results obtained;

(iii) Conclusions reached; and

(iv) The bases for those conclusions.

(2) Submit a notice of results of the applicant's background investigation to the Commission no later than sixty (60) days after the applicant begins work. The notice of results shall contain:

- (i) Applicant's name, date of birth, and social security number;
 - (ii) Date on which applicant began or will begin work as key employee or primary management official;
 - (iii) A summary of the information presented in the investigative report, which shall at a minimum include a listing of:
 - A. Licenses that have previously been denied;
 - B. Gaming licenses that have been revoked, even if subsequently reinstated;
 - C. Every known criminal charge brought against the applicant within the last 10 years of the date of application; and
 - D. Every felony of which the applicant has been convicted or any ongoing prosecution.
 - (iv) A copy of the eligibility determination made under §556.5 of this part.
- § 556.7 Notice.

(a) All notices under this part shall be provided to the Commission through the appropriate Regional office.

(b) Should a tribe wish to submit notices electronically, it should contact the appropriate Regional office for guidance on acceptable document formats and means of transmission.

§ 556.8 Compliance with this part.

All tribal gaming ordinances and ordinance amendments approved by the Chair prior to the effective date of this part and that reference this part, do not need to be amended to comply with this part. All future ordinance submissions, however, must comply.

2. Revise Part 558 to read as follows:

PART 558 – GAMING LICENSES FOR KEY EMPLOYEES AND PRIMARY MANAGEMENT OFFICIALS.

Sec.

558.1 Scope of this part.

558.2 Review of notice of results for a key employee or primary management official.

558.3 Notification to NIGC of license issuance and retention obligations

558.4 Notice of disqualifying information and licensee right to a hearing.

558.5 Submission of notices.

558.6 Compliance with this part.

Authority: 25 U.S.C. 2706, 2710, 2712.

§ 558.1 Scope of this part.

Unless a tribal-state compact assigns responsibility to an entity other than a tribe, the licensing authority for class II or class III gaming is a tribal authority. The procedures and standards of this part apply only to licenses for primary management officials and key employees. This part does not apply to any license that is intended to expire within 90 days of issuance.

§ 558.2 Review of notice of results for a key employee or primary management official.

(a) Upon receipt of a complete notice of results for a key employee or primary management official as required by 25 C.F.R. § 556.6(b)(2), the Chair has 30 days to request additional information from a tribe concerning the applicant or licensee and to object.

(b) If the Commission has no objection to issuance of a license, it shall notify the tribe within thirty (30) days of receiving notice of results pursuant to § 556.6(b)(2).

(c) If, within the 30 day period described in §558.3(a) of this part, the Commission provides the tribe with a statement itemizing objections to the issuance of a license to a key employee or to a primary management official applicant for whom the tribe has provided a notice of results, the tribe shall reconsider the application, taking into account the objections itemized by the Commission. The tribe shall make the final decision whether to issue a license to such applicant.

(d) If the tribe has issued the license before receiving the Commission's statement of objections, notice and hearing shall be provided to the licensee as provided by § 558.4.

§ 558.3 Notification to NIGC of license issuance and retention obligations

(a) After a tribe has provided a notice of results of the background check to the Commission, a tribe may license a primary management official or key employee.

(b) A gaming operation shall not employ a key employee or primary management official who does not have a license after ninety (90) days.

(c) If a tribe does not license an applicant —

(1) The tribe shall notify the Commission; and

(2) Shall forward copies of its eligibility determination under this section and investigative report (if any) under §556.6(b)(1) to the Commission for inclusion in the Indian Gaming Individuals Record System.

(d) Within 30 days after the issuance of the license, a tribe shall notify the Commission of its issuance.

(e) A tribe shall retain the following for inspection by the Chair or his or her designee for no less than three years from the date of termination of employment:

(1) Applications for licensing;

(2) Investigative reports; and

(3) Eligibility determinations.

§ 558.4 Notice of information impacting eligibility and licensee's right to a hearing.

(a) If, after the issuance of a gaming license, the Commission receives reliable information indicating that a key employee or a primary management official is not eligible for employment under §556.5, the Commission shall notify the issuing tribe of the information.

(b) Upon receipt of such notification under paragraph (a) of this section, a tribe shall immediately suspend the license and shall provide the licensee with written notice of suspension and proposed revocation.

(c) A tribe shall notify the licensee of a time and a place for a hearing on the proposed revocation of a license.

(d) A right to a hearing under this part shall vest only upon receipt of a license granted under an ordinance approved by the Chair.

(e) After a revocation hearing, a tribe shall decide to revoke or to reinstate a gaming license. A tribe shall notify the Commission of its decision within 45 days of receiving notification from the Commission pursuant to subsection (a).

§ 558.5 Submission of notices.

(a) All notices under this part shall be provided to the Commission through the appropriate Regional office.

(b) Should a tribe wish to submit notices electronically, it should contact the appropriate Regional office for guidance on acceptable document formats and means of transmission.

§ 558.6 Compliance with this part.

All tribal gaming ordinances and ordinance amendments that have been approved by the Chair prior to the effective date of this section and that reference this part do not need to be amended to comply with this section. All future ordinance submissions, however, must comply

DATED: December _16__, 2011, Washington, DC.

Tracie L. Stevens,

Chairwoman

Steffani A. Cochran,

Vice-Chairwoman

Daniel J. Little,

Associate Commissioner

7565-02

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